No. 39672-6-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

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ELINOR JEAN TATHAM,

*Respondent,*

v.

JAMES CRAMPTON ROGERS,

*Appellant,*

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# BRIEF OF RESPONDENT

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## A. STATEMENT OF THE CASE

Dr. Tatham largely accepts the statement of facts presented by Mr. Rogers with the following additions.

Mr. Rogers did not offer any evidence at trial suggesting that his mental condition negatively impacted his ability to work. In fact, Mr. Rogers testified that he was going to school, studying, and working as a carpenter. RP II, 227. He also testified that he was researching some alternative medicine "things," and that he had set up a new company "to do some consulting." RP II, 228. Mr. Rogers finally conceded that he had never been well-compensated for his work in the past, but that he had a history of being generous. RP III, 322. In response to repeated questioning about his employment, he stated that he was "a relatively wealthy man." RP III, 322.

## B. ARGUMENT

### 1. In making a division of quasi-community property at the conclusion of a committed intimate relationship, the court may consider the nature and extent of each party's separate property.

In *Connell v. Franciso*, 127 Wash.2d. 339, 898 P.2d 831 (1995), the issue before the Court was the extent to which the principles contained in RCW 26.09.080 govern the disposition of property following a

meretricious relationship. 127 Wash.2d at 348, 898 P.2d at 835. RCW 26.09.080 provides:

> In a proceeding for dissolution of marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of marriage by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner or lacked jurisdiction to dispose of the property, the court shall, without regard to marital misconduct, make such disposition of the property and liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:
>
> (1) The nature and extent of the community property;
>
> (2) The nature and extent of the separate property;
>
> (3) The duration of the marriage or domestic partnership; and
>
> (4) The economic circumstances of each spouse or domestic partner at the time of the division of property is to become effective....

The *Connell* Court noted that "[w]hile portions of RCW 26.09.080 may apply by analogy to meretricious relationships, not all provisions of the statute should be applied." 127 Wash.2d at 349, 898 P.2d at 836. After an extensive analysis, the Court held that "property which would have been characterized as separate property had the couple been married is not before the court for division at the end of the relationship." *Id.* At 352. In so holding, the *Connell* Court negated the language in RCW

26.09.080 which provides that the court shall make a just and equitable division of the properties and liabilities of the parties, ***either separate or community.***

The *Connell* Court, however, did not take the additional step of holding that the court could not even consider the separate property of the parties in making a just and equitable distribution of the property, thereby negating paragraph (2) of RCW 26.09.080 which provides that the nature and extent of the separate property should be considered. Nor has any other court which has subsequently applied the principles set forth by the *Connell* Court. See *Sutton v. Widner*, 85 Wash.App. 487, 933 P.2d 1069 (1997); *Lindemann v. Lindemann*, 92 Wash.App. 64, 960 P.2d 966 (1998); *Koher v. Morgan*, 93 Wash.App. 398, 968 P.2d 920 (1998); *In re Marriage of Pennington*, 142 Wash.2d 592, 14 P.3d 764 (2000); *Vasquez v. Hawthorne*, 145 Wash.2d 103, 33 P.3d 735 (2001); *Rhone v. Butcher*, 140 Wash.App. 600, 166 P.3d 1230 (2007); *Olver v. Fowler*, 131 Wash.App. 135, 126 P.3d 69 (2007).

If a court were prohibited from considering the nature and extent of the parties'separate property, RCW 26.09.080(3) would also be rendered meaningless as that provision directs the court to consider "the economic circumstances of each spouse or domestic partner at the time the division is to be made effective." The court would be limited to

considering the nature and extent of the community property and the duration of the relationship. Clearly, that is not what the *Conne*ll Court intended.

Instead, the *Connell* court carefully limited its holding, stating that "the property owned by each party prior to the relationship should not be before the court ***for distribution*** at the end of the relationship. *Connell* at 349 (emphasis). At the conclusion of its opinion, the *Connell* court stated: "In summary, we hold that property which would have been characterized as separate property had the couple been married is not before the court ***for division*** at the end of the relationship. *Connell* at 352 (emphasis added). If the *Connell* court had intended that the parties' separate property be excluded from the court's consideration at all, the court could have simply omitted the phrases "for distribution" and "for division."

Furthermore, every single court which has referenced the holding in *Connell* has been careful to limit its application to the distribution, as opposed to the consideration, of separate property. *Lindemann* at 69 ("Separate property is not before the court for distribution."); *Koher* at 402 ("In contrast, the assets that would be characterized as separate property are not subject to distribution because the parties chose not to get married."); *Olver* at 140 ("Unlike the division of property upon dissolution of a marriage, when both separate and community property are before the

court for equitable distribution, a court dividing property acquired during a committed intimate relationship may exercise its discretion only as to property that would have been community had the parties been married.").

The Appellant's reliance on the Court's decision in *Soltero v. Wimer*, 159 Wn.2d 428, 150 P.3d 552 (2007) is misplaced. The *Soltero* decision does not stand for the proposition that the separate property of the parties cannot be considered by the court in making a just and equitable distribution. Instead, the *Soltero* court articulated the same rule as the Connell court, stating that "[u]nlike the distribution in a divorce, however, the *separate* property of the parties in a dissolving meretricious relationship is *not* subject to distribution." *Id.* At 430. The trial court was reversed, not because it considered the separate property of the parties, but because there was no quasi-community property to distribute.

**2. A 75/25% split of quasi-community property is not presumptively an abuse of judicial discretion.**

Appellant cites two, relatively older, cases, decided under former RCW 26.09.080 as support for the proposition that a 75/25% division of quasi-community property is presumptively an abuse of discretion. See *Wills v. Wills*, 50 Wn.2d 439, 312 P.2d 661 (1957); *Dickison v. Dickison*, 64 Wash.2d 585, 399 P.2d 5 (1965). Neither of these two cases, however, has ever been cited for the proposition that a 75/25% division of property

is presumptively an abuse of discretion. Instead, the holdings in both cases were limited to the specific facts of those cases.

Subsequent cases, including cases involving committed intimate relationships, have made disparate divisions of property which were upheld on appeal. See *Sutton v. Widner*, 85 Wash.App. 487, 933 P.2d 1069 (1997) (A 36/64% split of quasi-community property is not inherently inequitable); *Marriage of Davison*, 112 Wn.App. 251, 258, 48 P.3d 358 (2002) (A 25/75% split of community property is not inherently inequitable.)

Equally important, though, is the fact that the trial court did not base its decision solely on the separate property of the parties. The court also stated that "[i]n addition most of the community property was acquired as a result of Dr. Tatham's employment." CP 120, Concl. Law No. 16. A court is permitted, in exercising its discretion, to consider one partner's unusually significant contributions to the acquisition of the community property. *Marriage of White*, 105 Wash.App. 545, 551, 20 P.3d 481 (2001). In this case, it is undisputed that Mr. Rogers was unemployed during most of the relationship, devoting his energy, efforts and a portion of his income to increasing the value of his separate property, i.e., a residence acquired before cohabitation. CP 116. Dr. Tatham, by contrast, was employed on a full-time basis. *Id.* Thus,

virtually all of the quasi-community property acquired during the parties' relationship was a result of Dr. Tatham's efforts, with little to no contribution by Mr. Rogers. These facts also support the trial court's disparate award to Dr. Tatham.

**3. The trial court did not abuse its discretion in awarding Respondent 75% of the quasi-community property where Appellant failed to offer evidence at trial regarding his mental condition and how that alleged mental illness affects his ability to earn income. Instead, Appellant testified that he is relatively wealthy man with no need to earn income.**

Appellant filed a Motion to Reconsider the court's division of property. The court denied the motion, stating:

> Mr. Rogers did not introduce evidence in either the "parenting plan" phase of the litigation between these parties or in the "property division" phase of this litigation of: (1) a diagnosed mental illness (2) the effect of that alleged mental illness on his ability to earn an income (3) the effect of that alleged mental illness on his ability to manage his significant assets in order to earn an income (4) the reasons for and the ultimate disposition of substantial withdrawals from his inheritance account as mentioned on page 5 of the memorandum opinion (5) the prospects of income from the corporation he either is forming or was formed or (6) any future plans he has for income other than through his corporation, continued carpentry jobs and his investments. His testimony is that he is a relatively wealthy man who does not have to pursue full time employment.

Appellant relies heavily on his alleged mental illness as a basis for awarding him, rather than Respondent, a disproportionate share of the quasi-community property. But, as the trial court noted, no evidence was

offered as to the effect his mental illness has on his ability to work and earn income. As a consequence, the appellate court should afford little weight to Mr. Rogers' assertions that his mental illness should have been a significant factor in the court's division of quasi-community property.

## C. CONCLUSION

For the above reasons, Dr. Tatham respectfully requests the court to affirm the trial court's decision and award Dr. Tatham her reasonable attorney's fees on this appeal.

Respectfully submitted this 6th day of April, 2010.

Peggy Ann Bierbaum, WSBA#21398
Attorney for Respondent

NO. 39672-6-II

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

| | |
|---|---|
| ELINOR JEAN TATHAM,<br>Respondent, | |
| vs. | NO. 39672-6-II |
| JAMES CRAMPTON ROGERS,<br>Appellant. | DECLARATION OF MAILING |

I, Lisa M. Hansen, declare that on April 8, 2010, I placed in the U.S. Mail, a copy of the Brief of Respondent, first class postage affixed and addressed to:

James E. Lobsenz
CARNEY BRADLEY SPELLMAN P.S.
701 Fifth Avenue Suite 3600
Seattle, WA 98104

The original and one copy of this document were placed in the U.S. Mail on April 8, 2010, first class postage affixed, and addressed to:

DAVID C. PONZOHA
COURT CLERK
The Court of Appeals of the State of Washington
950 Broadway Suite 300
Tacoma, WA 98402-4454

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8th day of April, 2010, in Port Townsend, Washington.

Lisa M. Hansen
Legal Assistant